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WRITTEN OBSERVATIONS OF THE REPUBLIC OF AUSTRIA

Case C-362/14 *

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To the President and Members of the Court

WRITTEN OBSERVATIONS OF THE REPUBLIC OF AUSTRIA

under Article 23 of the Protocol on the Statute

of the Court of Justice of the European Union

in

CASE C-362/14

The Republic of Austria comments as follows on the request for a preliminary ruling made by the High Court of Ireland in its decision of 17 July 2014:

I – Questions referred

1 The High Court of Ireland has referred the following questions to the court for an interpretation of EU law by way of a preliminary ruling:

'Whether in the course of determining a complaint which has been made to an independent office holder who has been vested by statute with the functions of administering and enforcing data protection legislation that personal data is being transferred to another third country (in this case, the United States of America) the

* Language of the case: English.

laws and practices of which, it is claimed, do not contain adequate protections for the data subject, that office holder is absolutely bound by the Community finding to the contrary contained in Commission Decision of 26 July 2000 (2000/520/EC) having regard to Article 7, Article 8 and Article 47 of the Charter of Fundamental Rights of the European Union (2000/C 364/011), the provisions of Article 25(6) of Directive 95/46/EC notwithstanding? Or, alternatively, may and/or must the office holder conduct his or her own investigation of the matter in the light of factual developments in the meantime since that Commission Decision was first published?'

II – Legal evaluation

1. The binding effect of adequacy decisions under Article 25(6) on supervisory authorities within the meaning of Article 28 of Directive 95/46/EC in general

2 Directive 95/46/EC [1] ('the Directive') creates a specific legal framework for EU Member States for the transfer of personal data to third countries. Under Article 25 of the Directive the Member States are to provide that 'that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if … the third country in question ensures an adequate level of protection' (not underlined in the original text). Looked at in particular together with the Directive's Recitals 56 and 57 and the French and English wording [2] it becomes evident that Article 25 should not be read as a 'permissive' provision but as a 'prohibition'. [3] In other words, **only where** an **'adequate level of protection' exists in the third country, may a transfer** of personal data **be permitted from Member States (in general).** Otherwise **the transfer should be prohibited.** [4] The relevant criteria for assessing

[1] – Directive of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23/11/1995, p. 31.

[2] – *The French or English wording of Article 25(1) of Directive 95/46/EC read as follows: 'Les États membres prévoient que le transfert vers un pays tiers de données à caractère personnel faisant l'objet d'un traitement, ou destinées à faire l'objet d'un traitement après leur transfert,* ***ne peut avoir lieu*** *que si, sous réserve du respect des dispositions nationales prises en application des autres dispositions de la présente directive, le pays tiers en question assure un niveau de protection adéquat.' 'The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after* ***transfer may take place only if****, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection.'; emphasis added*.

[3] – Cf. on point *Dammann/Simitis*, EG-Datenschutzrichtlinie, Kommentar (1997), paragraph 4 on Article 25

[4] – Cf. ECJ Case C-101/01, paragraph 64. See also *Ehmann/Helfrich*, EG-Datenschutzrichtlinie. Kurzkommentar (1999), paragraphs 11 and 20 on Article 25.

the existence or absence of such 'adequate level of protection' are set out in Article 25(2) of the Directive. The Member States and Commission are to inform each other of cases where they consider that a third country does not demonstrate an 'adequate level of protection' (cf. Article 25(3)).

3 In order to remove a burden from Member States when determining the relevant level of protection in the sense of interest here and to harmonise assessment in that regard by the Member States, Article 25 of the Directive enables the Commission to assess the level of data protection offered in a particular third country, on the basis of a committee composed of the representatives of the Member States under Article 31 of the Directive.

4 Where the Commission finds, under Article 25(4) in conjunction with Article 31(2) of the Directive, that a particular third country does not demonstrate an adequate level of protection within the meaning of Article 25(2), **the Member States are to take** the **measures** necessary **to prevent** any **transfer of data of the same type** to the third country in question. From the wording of Article 25(4) in conjunction with Recital 57 it follows that any such finding is binding on the Member States or their supervisory authorities within the meaning of Article 28 of the Directive. Specifically, this means there is an **obligation to prohibit data transfers** to the relevant third country. [5] In addition, a **'negative finding'** by the Commission based on Article 25(4) may also be restricted only to a specific processing sector, a field or specific modes of transfer of this third country. This follows from the reference in Article 25(4) to the assessment criteria in Article 25(2) of the Directive. [6]

5 Under Article 25(6) in conjunction with Article 32(2) of the Directive, the Commission may also find that a particular third country or a specific sector, field etc. [7] of it demonstrates an adequate level of protection within the meaning of Article 25(2) leg. cit. **('positive decision').** In that case 'the Member States shall take the measures necessary to comply with the Commission's decision' (cf. Article 25(6) Sentence 2). The fact that the Commission finds that there is an adequate level of data protection does not mean there is an obligation under EU law on the Member States to adopt a specific measure such as the (unconditional) approval of data transfers to the relevant third country. This follows from the formulation of the legal consequence, which clearly differs from Article 25(4) of the Directive ('negative decision'). [8] A positive decision under Article 25(6) of the

5 – See ECJ Case C-101/01, paragraph 69, and *Dammann/Simitis*, EG-Datenschutzrichtlinie. Kommentar (1997), paragraphs 20 and 30 on Article 25.

6 – See *Dammann/Simitis*, EG-Datenschutzrichtlinie. Kommentar (1997), paragraph 20 on Article 25.

7 – See Article 25(6) Sentence 1 in conjunction with Article 25(2), second half of the sentence, of Directive 95/46/EC.

8 – See *Dammann/Simitis*, EG-Datenschutzrichtlinie. Kommentar (1997), paragraphs 27 and 30 on Article 25. For a contrary opinion see Ehmann/Helfrich, EG-Datenschutzrichtlinie. Kurzkommentar (1999), paragraph 24 on Article 25 — admittedly before the first adequacy

Directive merely makes it clear that the level of protection in the relevant third country does not pose an obstacle to the transfer of data. In other words, positive decisions by the Commission certainly have the effect of harmonising the assessment by Member States of the adequacy of the data protection level in a third country but **cannot be treated as amounting to a comprehensive standardisation of the practice** of data transfer to and from third countries. Specifically, transfer restrictions may arise on grounds unrelated to data protection — such as 'reservations' or restrictions by individual states on constitutional or human rights grounds.

2. The binding effect of Commission Decision 2000/520/EC of 26 July 2000, based on Article 25(6), in relation to the 'safe harbour' in particular

6 Put simply, the Commission Decision of 26 July 2000 (2000/520/EC) based on Article 25(6) and (2) of the Directive [9] ('the Decision') established the adequacy of the level of data protection in relation to specific organisations in specific sectors of the US economy. In order to take advantage of the 'positive effect' of this adequacy decision, a US organisation in the sector under consideration must 1. unambiguously and publicly commit to comply with the 'safe harbour' privacy principles ('the Principles') implemented under the guidelines included in the frequently asked questions ('FAQs') issued by the US Department of Commerce on 21 July 2000, 2. be subject to the supervision of the Federal Trade Commission and 3. have actually implemented the Principles in line with the quoted guidelines. [10]

7 Under Article 1(3) of the Decision (2000/520/EC) the existence of these requirements **is considered to be met** from the date on which the relevant US organisation notifies to the US Department of Commerce the public disclosure of the commitment and the identity of the responsible US supervisory authority.

8 The **presumption** — laid down in Article 1(3) of the Decision — that an appropriate level of data protection is ensured in relation to data processing by specific US organisations is admittedly **rebuttable.** This is clear from the wording of Article 3(1) in conjunction with Recital 8 of this Decision. Under Article 3(1)(b) of the Decision the 'competent authorities in the Member States', i.e. the supervisory authorities within the meaning of Article 28 of the Directive, **may** indeed **exercise** 'their existing powers to **suspend** data flows to an

decisions were published by the Commission on the basis of Article 25(6) of Directive 95/46/EC.

9 – Commission Decision of 26 July 2000 (2000/520/EC) pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441) OJ L 215 25.8.2000, p. 7 — 47.

10 – See Article 1(2) and (1) in conjunction with Annexes I-VII to Commission Decision of 26 July 2000 (2000/520/EC).

organisation that has self-certified its adherence to the Principles implemented in accordance with the FAQs in order to protect individuals with regard to the processing of their personal data **if** … (b) **there is a substantial likelihood** that the Principles are being violated ….' The suspension should end as soon as it is established that the Principles implemented according to the FAQs are being followed and the competent authorities in the European Union have been made aware of this. [11]

9 This approach of the rebuttable presumption along with the option of a temporary ban on data transfer to a third country that has, by a decision under Article 25(6) of the Directive, in principle been recognised as providing an adequate protection has been adopted by the Commission not just in the Decision (2000/520/EC) that is primarily of interest here but in a whole series of further adequacy decisions. [12]

10 It follows from what has been said above that the Commission itself in any event does not assume that an adequacy decision under Article 25(6) in conjunction with Article 25(2) of the Directive necessarily always has quasi- absolute binding effect on the supervisory authorities within the meaning of Article 28 of the Directive. Rather, the specific drafting of the adequacy decisions shows that the supervisory authorities still have a certain latitude (through the temporary suspension of data transfers) to combat violations of the conditions that **in fact** need to be met for there to be any assumption of adequacy. In order to be able to find such violations, the supervisory authorities must of course have the appropriate powers.

11 Given the formulation of the question referred ('no meaningful protection of those affected in the law and practice of a third country') it might be questionable whether the powers under Article 3(1)(b) of Decision 2000/520/EC accruing to the supervisory authorities within the meaning of Article 28 of the Directive are extensive enough to prevent the transfer of data if the focus is not solely on a US organisation's violation of the 'safe harbour' Principles but rather reference is made to the level of protection to be ensured through the 'safe harbour' concept and practice as a whole.

[11] – See Article 3(1) and (2) of Commission Decision (2000/520/EC).

[12] – For example, see, Article 3(1) of Commission Decision (2000/518/EC) of 26 July 2000 under Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection of personal data in Switzerland, OJ L 215 of 25.8.2000, p. 1 —3; Article 3(1) of Commission Decision of 21.11.2003 (2003/821/EC) on the adequacy of protection of personal data in Guernsey, OJ L 308 of 25.11.2003, p. 27 — 28; Article 3(1) of the Commission Decision of 28 April 2004 on the adequate protection of personal data in the Isle of Man (2004/411/EC), OJ L 151 of 30.4.2004, p. 51 — 54; Article 3(1) of the Commission Decision of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States' Bureau of Customs and Border Protection (2004/535/EC), OJ L 235 of 6.7.2004, p. 11 — 22; Article 3(1) of the Commission Decision of 6 September 2005 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the Canada Border Services Agency (2006/253/EC), OJ L 91 of 29.3.2006, p. 49 — 60.

12 The national court seems to view the possibility — provided in Article 3(1)(b) of the Decision — of banning data transfers as being restricted to those cases in which the US organisation regarded as the recipient of the transfers acts in violation of the 'safe harbour' Principles. [13]

13 Such an approach would be reasonable if the 'safe harbour' Principles only bound US organisations that voluntarily agree to be bound by these rules by way of a notification under Article 1(3) of the Decision. At first sight, the wording of Article 1(2) and (3) and Article 3(1)(a) of the Decision points in that direction in that it primarily refers to the voluntary commitment by the US organisations to implement the Principles or any negative findings by the US supervisory authorities in this respect. In addition, the Principles contained in Annex I to the Decision themselves refer to the fact that they 'are intended for use solely by U.S. organizations receiving personal data from the European Union for the purpose of qualifying for the safe harbor and the presumption of "adequacy" it creates.' [14]

14 However, a closer examination reveals that the 'safe harbour' Principles are binding not just on US organisations but also certain US authorities; specifically, those appointed to supervise compliance with the Principles by US organisations that have voluntarily committed to comply with them (FTC, US Department of Transportation). From the power of these supervisory authorities anchored in Article 3(1)(a) of Decision 2000/520/EC to determine violations of the Principles a simultaneous obligation arises to continually monitor the practices of the US organisations that 'drop anchor' 'in the safe harbour'. This becomes clear through the case of the suspension of data transfers by a supervisory authority within the meaning of Article 28 of the Directive, addressed in Article 3(1)(b) of the Decision, 'if there is a reasonable basis for believing that the enforcement mechanism concerned is not taking or will not take adequate and timely steps to settle the case at issue …'.

15 Overall this demonstrates that the **presumption** of an adequate level of protection laid down by the Decision relies **not only** on **faith in the integrity** of the US organisations that commit to implement the 'safe harbour' Principles **but also on faith** in **the effective supervision or implementation** by the relevant **US authorities**.

16 In addition to the **aforementioned** supervisory authorities, other US government bodies are also indirectly affected by the 'safe harbour' Principles. Indeed, the Principles state among other things that their 'adherence may be limited (a) **to the extent necessary to meet national security**, public interest, or law enforcement requirements; (b) by statute, government regulation, or case law that create conflicting obligations or explicit authorizations, provided that, in exercising any such authorization, an organization can demonstrate that its non-compliance with

13 – See Paragraph 19 of the Irish High Court's request for a preliminary ruling.
14 – See Annex I Paragraph 2 Sentence 3 to the Commission Decision (2000/520/EC).

the Principles is **limited to the extent necessary** to **meet the overriding legitimate interests** furthered by such authorization; or (c) if the effect of the Directive [or] Member State law is to allow exceptions or derogations, provided such exceptions or derogations are applied in comparable contexts.'.

17 It follows from what has been said in the previous paragraph that, on the part of the US, compliance with the 'safe harbour' Principles may certainly be limited by contrary provisions for reasons, for example, of 'national security' without this amounting to a violation of the Principles per se. However, one might safely assume, against the background of the Commission's commitment to the fundamental rights already in existence at the time the Decision was being 'worked out' or adopted by the EU, in particular to Article 8 of the European Convention on Human Rights (see Article 6(1) and (3) of the ECHR in the Treaty of Amsterdam version), and from the understanding that underlies the Decision as a whole that the Member States of the European Union are able to rely in particular on the fact that if the national security 'exception' is relied upon this will not be to an extent that is unreasonable. From this perspective the Decision 2000/520/EC also incorporates into legislation a rebuttable belief on the part of the Members States or their supervisory authorities under Article 28 of the Directive that the US government will adopt a constructive and moderate administrative approach as a whole to the extent substantive references arise to the 'safe harbour' Principles.

18 This understanding of the 'safe harbour' Principles incidentally is also confirmed by the Commission's Communication of 27 November 2013 on the Functioning of the Safe Harbour …, [15] which, taking into account the above exceptions for the benefit of national security or of the public interest, expressly provides that '**in order for** limitations and restrictions on the enjoyment of fundamental rights **to be valid**, **they must be narrowly construed**; they must be set forth in a publicly accessible law and they must be necessary and proportionate in a democratic society.' [16]

19 To summarise, it can thus be concluded here that the power — arising under Article 3(1) of the Decision — of the supervisory authorities within the meaning of Article 28 of the Directive relates not just to violations of the 'safe harbour' Principles of which individual US organisations may be accused but clearly extends further and also includes modes of behaviour implemented by the US authorities and which undermine or could undermine these Principles.

[15] – See Communication COM (2013) 847 final of the European Commission of 27 November 2013 to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU.

[16] – See ibid. p. 18.

3. The question of the restriction of the discretion of supervisory authorities within the meaning of Article 28 of the Directive by Articles 7 and 8 of the EU Charter of Fundamental Rights ('Charter') in implementing Article 3 of the Commission's Decision of 26 July 2000 relating to 'safe harbour'.

20 Under the Court's established case law the Member States do not just have to interpret their national law in compliance with EU law but also to interpret secondary EU legislation so as to avoid clashes with the fundamental rights protected by EU legislation or with the other general principles of EU law. [17]

21 In the present case the central rule of secondary law in Article 25(6) of the Directive itself expressly states that Commission Decisions based on it are to ensure an adequate level of 'protection of the private lives and **basic freedoms and rights of individuals'**.

22 Hence there is no doubt that the authorisation in Article 3(1) of the Decision 2000/520/EC, which provision is based on Article 25(6) of the Directive, should also be construed in the light of Articles 7 and 8 of the Charter.

23 In this context a look at the Court's interpretation, in Joined Cases C-411/10 and C-493/10, of Article 3(2) of Regulation (EC) No 343/2003 [18] (since replaced by Article 17(1) of Regulation (EU) No 604/2013 of 26 June 2013) [19] is of particular interest. Under this provision each Member State **was able to examine** the content of an application by a citizen of a third country for asylum even if, under the Regulation's responsibility criteria (Art. 5 et seq. leg. cit.), [20] it was not necessarily responsible.

24 Fundamentally, the system of allocating responsibility created by the above Regulation rested on the principle of mutual **trust**, and specifically on asylum seekers experiencing treatment in each individual EU Member State that is consistent with the requirements of the Charter of Fundamental Rights and the Geneva Convention on Refugees. [21] In this context reference should have

[17] – See ECJ Case C-101/01, paragraph 87; Case C-305/05, paragraph 28; Joined Cases C-411/10 and C-493/10, paragraph 77.

[18] – Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50 of 25.2.2003, p. 1 — 10.

[19] – Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180 of 29.6.2013, p. 31 — 59.

[20] – Now Articles 7 et seq. of Regulation (EU) No 604/2013.

[21] – See Joined Cases C-411/10 and C-493/10, paragraphs 78-80; also Case C-4/11, paragraph 54; Case C-394/12, paragraph 52.

been/should be made to relevant specific EU-law minimum standards for the treatment of asylum seekers. [22]

25 In this context it appeared legitimate, in order to avoid repeat proceedings in relation to one and the same asylum application, to concentrate the proceedings in the Member State identified using the responsibility criteria from Council Regulation (EC) No 343/2003 and to establish a corresponding transfer or acceptance obligation in relation to asylum seekers who had already made their application in a different Member State. [23] In Joined Cases C-411/10 and C-493/10 the Court held that a transfer to the EU Member State with responsibility for conducting the asylum proceedings would be incompatible with Article 4 of the Charter (Prohibition of torture and inhuman or degrading treatment or punishment) if 'there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State'. [24] In such a case the 'may' of Article 3(2) of Regulation (EC) No 343/2003 becomes, in the Court's interpretation, a 'must'.

26 The Court's reasoning described above can also be applied to the provision in Article 3(1) of Decision 2000/520/EC that is of interest here. So that this provision can effectively carry out its intended function to protect, in particular the fundamental right of data protection (Article 8 of the Charter), it is essential that actual violations of the 'safe harbour' Principles of which the authorities actually become aware are immediately addressed and, where necessary, responded to with a temporary suspension of data transfers. Hence Article 3(1) of Decision 2000/520/EC should be read as meaning that where one of the situations in Article 3(1)(a) or (b) of the Decision applies the supervisory authorities within the meaning of Article 28 of the Directive **must exercise** their powers to protect individuals with regard to the processing of their personal data for the protection of Article 8 of the Charter and must take appropriate action.

22 – See in particular Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States, OJ L 31 of 6.2.2003, p. 8 — 15; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304 of 30.9.2004, p. 12 — 23, since replaced by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337 of 20.12.2011, p. 9 — 26, as well as Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326 of 13.12.2005, p. 13 — 34.

23 – See Paragraphs 16 et seq. of Regulation (EC) No 343/2003 or (now) Articles 18 et seq. of Regulation (EU) No 604/2013 of 26 June 2013.

24 – See ECJ Joined Cases C-411/10 and C-493/10, paragraph 86.

III – Proposed response to the questions referred

27 On the basis of the above considerations the Republic of Austria proposes the following response to the questions referred by the High Court of Ireland:

'In the course of determining a complaint which has been made to an independent office holder who has been vested by statute with the functions of administering and enforcing data protection legislation that personal data is being transferred to another third country (in this case, the United States of America), the laws and practices of which, it is claimed, do not contain adequate protections for the data subject, that office holder may and must exercise its powers and take appropriate steps with regard to Article 25(6) of Directive 95/46/EC, European Commission Decision 2000/520/EC of 26 July 2000 relating to "safe harbour" and Article 7, Article 8 and Article 47 of the Charter of Fundamental Rights of the European Union, particularly in the light of factual developments in the meantime since that Commission Decision was first published.'

Vienna, 6 November 2014

On behalf of the Republic of Austria:

SC Dr Gerhard HESSE